

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
January 13, 2009 Session

**STATE OF TENNESSEE v. KALE J. SANDUSKY**

**Appeal from the Circuit Court for Wayne County**  
**No. 14203     Jim T. Hamilton, Judge**

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**No. M2008-00589-CCA-R3-CD - Filed March 4, 2009**

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This is a direct appeal from a guilty plea pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. The Defendant, Kale J. Sandusky, pleaded guilty to possession of marijuana with the intent to sell and unlawful possession of drug paraphernalia. In his plea agreement, the Defendant attempted to reserve a certified question of law, challenging the trial court's denial of his motion to suppress the evidence seized during the searches of his residence. Because the Defendant has failed to properly certify his issue for review, the appeal is dismissed.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

John S. Colley, III, Columbia, Tennessee, for the appellant, Kale J. Sandusky.

Robert E. Cooper, Jr., Attorney General; Cameron L. Hyder, Assistant Attorney General; Mike Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The facts are not in dispute. On October 23, 2006, officers went to 207 Second Avenue North in Collinwood to serve a misdemeanor warrant on Brandon Daniel for failure to appear.<sup>1</sup> When the officers arrived at the residence, they noticed the back door leading upstairs was open, and

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<sup>1</sup> Daniel was cited for driving on a suspended license, violation of the registration law, and violation of the financial responsibility law. Daniel failed to appear. On the citation, Daniel's address is shown as 207 Second Avenue North, Collinwood.

they also noticed two surveillance cameras. There was no response to officers' commands for Daniel to come to the door. Believing Daniel might be inside, the officers proceeded inside and observed in plain view marijuana, packaging material, marijuana plants, and grow lights.

The officers exited the premises. While the officers were still present on the scene, the Defendant arrived and stated that he lived at the residence. The Defendant was not permitted to reenter the residence. He was asked for consent to search, but he refused. The officers obtained a search warrant and seized the contraband.

On April 13, 2007, the Defendant was indicted for possession of approximately one pound of marijuana with the intent to sell and unlawful possession of drug paraphernalia. The Defendant filed a motion to suppress the evidence seized during the searches of his residence, arguing that the arrest warrant for Daniel was defective and thus, that both searches, the initial entry to look for Daniel and the search pursuant to the search warrant, violated the Defendant's constitutional rights. The motion was denied.

Thereafter, on February 7, 2008, the Defendant entered into a negotiated plea agreement under Rule 11 of the Tennessee Rules of Criminal Procedure, in which he pleaded guilty to possession of marijuana with the intent to sell, a Class E felony, and unlawful possession of drug paraphernalia, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-17-417, -425. He was sentenced to concurrent terms of two years as a Range I, standard offender and eleven months and twenty-nine days, respectively. The plea was accepted by the trial court.

As part of his plea, the Defendant, pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure, attempted to reserve the right to appeal a certified question of law dispositive of the case. The respective judgment of conviction forms contained the following notation within the special conditions section: "Plea agreement included certified question of law for appeal, \*see attachment." The "attachment" is presumably the order entered on February 7, 2008, titled, "Order Certifying Issue for Appellate Review," wherein the Defendant reserved the following certified question of law: "whether or not the entries by law enforcement into [the Defendant's] home on October 23, 2006 were in violation of constitutional guarantees against unreasonable searches and seizures under the state and federal constitutions . . . ." It was further stated that the parties agreed the issue was dispositive of the case and that the issue was reserved with the consent of the parties.

The Defendant filed a notice of appeal. In his brief on appeal, the Defendant argues that the arrest warrant for Daniel was invalid and thus all the evidence discovered was the fruit of unlawful searches. The State argues initially on appeal that the certified question of law is simply too broad and ambiguous for appellate review. We agree with the State.

### **Analysis**

The Defendant has attempted to reserve his certified question pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure, which provides that a defendant may appeal from any judgment of conviction occurring as a result of a guilty plea if the following requirements are met:

(i) [T]he judgment of conviction or other document to which such judgment refers that is filed before the notice of appeal, contains a statement of the certified question of law that the defendant reserved for appellate review;

(ii) [T]he question of law is stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;

(iii) the judgment or document reflects that the certified question was expressly reserved with the consent of the state and the trial court; and

(iv) the judgment or document reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case . . . .

See also State v. Armstrong, 126 S.W.3d 908, 912 (Tenn. 2003); State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988).

Additionally, in Preston, our supreme court explicitly provided prerequisites to appellate consideration of a certified question of law under Rule 37(b)(2)(A),<sup>2</sup> stating as follows:

Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. Most of the reported and unreported cases seeking the limited appellate review pursuant to Tenn. R. Crim. P. 37 have been dismissed because the certified question was not dispositive. Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the

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<sup>2</sup> The Tennessee Rules of Criminal Procedure were amended subsequent to Preston, said changes becoming effective July 1, 2006. See Compiler's Notes, Tenn. R. Crim. P. (2006). As part of this undertaking, numerous sections and/or subparts of various rules were renumbered.

appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

Preston, 759 S.W.2d at 650); see also State v. Pendergrass, 937 S.W.2d 834, 836-37 (Tenn. 1996). The Defendant bears the burden of “reserving, articulating, and identifying the issue.” Pendergrass, 937 S.W.2d at 838.

The issue reserved in the trial court’s judgment is “whether or not the entries by law enforcement into [the Defendant’s] home on October 23, 2006 were in violation of constitutional guarantees against unreasonable searches and seizures under the state and federal constitutions . . . .” The Defendant’s brief, however, frames the issue as follows: “Must arrest warrants for the offense of ‘failure to appear’ be issued by a neutral and detached magistrate upon a sworn affidavit setting forth probable cause?”

The Defendant’s certified question is overly broad and fails to clearly identify the scope and limits of the legal issue reserved. We point out that the certified question does not mention the validity of an arrest warrant.

This overly broad question violates the mandates announced in Preston. The question is not only patently non-specific but also does not clearly identify the reasons relied upon by the [Defendant] at the suppression hearing. Additionally, review of the question as presently framed would potentially require a complete dissertation of the law of search and seizure of which this [C]ourt is not willing to engage in absent specific boundaries circumscribed by the [Defendant].

State v. Nicholas J. Johnson, No. M2000-03162-CCA-R3-CD, 2001 WL 1356369, at \*2 (Tenn. Crim. App., Nashville, Nov. 6, 2001). We are without jurisdiction to review the merits of the Defendant’s claim because he has failed to properly reserve his certified question of law.

### **Conclusion**

After carefully reviewing the record and the pleadings in this case, we conclude that the Defendant has failed to properly frame his certified question of law. Accordingly, this Court has no jurisdiction to entertain the appeal, and the appeal is dismissed.

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DAVID H. WELLES, JUDGE